Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-164

LOUISE M. ROCHELLE, Individually and as Administratrix of the Estate of William Paul Rochelle,
Petitioner,

v.

JUBETH FRENCH and JO RUTH RILEY WALLACE, Executrix of the Estate of Buford F. Wallace,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee

BRIEF FOR RESPONDENT

Jubeth French in Opposition

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JURISDICTION

Although Petitioner sought timely review for the lower decisions and her Petition before this Court, substantial questions exist as to whether there is a federal issue, whether it was raised at the first opportunity, and whether the existence of an independent and adequate State ground for the State Court's decisions precludes jurisdiction.

QUESTIONS PRESENTED

I

Whether a substantial federal issue exists.

II

Whether Petitioner's failure to assert the alleged due process violation in her Petition for Certiorari filed in the Supreme Court of Tennessee, precludes review in this Court because she failed to assert the federal issue at the first opportunity.

III

Whether an independent and adequate State ground for the State Court's decisions exists apart from any alleged federal issue, so as to render Petitioner's alleged due process violations moot.

IV

Whether damages, including costs and attorneys fees, should be awarded for the filing of a frivolous Petition for Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in part as follows: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This litigation was commenced by the filing of a declaratory judgment action by Dr. Buford Wallace, now deceased, in the Chancery Court of Shelby County, Tennessee, against Louise M. Rochelle, widow of Dr. William Paul Rochelle, and against Jubeth French, alleging that Dr. Wallace was the trustee of the proceeds of insurance policies on the life of Dr. Rochelle, and seeking adjudication as to the party entitled to receive the trust res.

Miss French asserted she was entitled to the proceeds as the beneficiary of the trust, with Mrs. Rochelle asserting that she was entitled to the proceeds because the trust was uncertain and therefore failed, because Miss French was guilty of various wrongful acts constituting alienation of affection, criminal conversation, fraud, and undue influence, and because the conveyance defeated the rights of Mrs. Rochelle as a widow and as a creditor, the estate of Dr. Rochelle being insolvent. After the Chancellor dismissed the tort claims of Mrs. Rochelle, she then filed a separate action against Miss French on these claims.

The Chancellor held that the trust failed for indefiniteness, and, therefore, a trust resulted in favor of Mrs. Rochelle, and that the tort claims were barred by the statute of limitations.

Miss French appealed to the Court of Appeals of Tennessee, Western Section, where, under Tennessee law, the review is de novo, accompanied only by a presumption of correctness of the ruling of the Chancellor. T.C.A. 27-301, T.C.A. 27-303. Mrs. Rochelle appealed the holding of the Chancellor that her tort claims were barred by the statute of limitations.

The Court of Appeals affirmed the holding that the tort claims were barred by the statute of limitations. (A-8, 9) It reversed the holding that the trust failed for indefiniteness, find-

ing that the terms were clear and Miss French was entitled to the trust res, and also holding that the estate was not insolvent. (A-4, 9)

Mrs. Rochelle sought review of the decision of the Court of Appeals by Petition for Certiorari to the Supreme Court of Tennessee, and, in the 293-page Petition, and in the Reply by Jubeth French, every fact, theory, and contention in the lawsuit was thoroughly discussed, and, after considering the Petition, Reply, and the entire record, the Supreme Court of Tennessee denied the Petition for Certiorari.

Thereafter, Mrs. Rochelle filed a Petition to reconsider in the Supreme Court of Tennessee, and there for the first time, claimed that her rights to due process under the Fourteenth Amendment to the Constitution of the United States of America had been violated alleging that the Court of Appeals, because it did not discuss and rule on every factual dispute in the lawsuit, and discuss in detail all of her theories, had failed to consider all of her theories and had denied her appellate review, and that the Supreme Court of Tennessee had denied her appellate review by not granting her Petition for a Writ of Certiorari.

The Petition to reconsider was denied on May 1, 1978. (A-13)

Mrs. Rochelle asserts to this Court that her Fourteenth Amendment due process rights were violated by the Courts below by this failing to consider all of her possible theories of recovery.

ARGUMENT

I

Petitioner asserts that the Court of Appeals of Tennessee in its decision, and the Tennessee Supreme Court in denying her Petition for Certiorari, failed to consider all of Petitioner's grounds for recovery, thereby violating procedural due process. The Court of Appeals, in its opinion, found all of the material facts and legal conclusions which were necessary to dispose of all the theories of Petitioner. It specifically discussed most of Petitioner's theories and the reasons for their rejection and its factual findings and legal conclusions that the trust was valid, that the estate was not insolvent and that the statute of limitations barred the tort claims, were an explicit rejection of most of the theories of Petitioner and an implicit rejection of all of them. (A-1, 9) Its judgment was proper under Tennessee law. Tenn.CodeAnn. Section 27-301, 27-303.

Further the Tennessee Supreme Court, after having the benefit of Petitioner's 293-page brief on her six asserted grounds of recovery, rejected them in denying her Petition for Certiorari and concurred in the result reached in the Court of Appeals.

She is simply seeking to avoid her loss on the merits by interposing an alleged federal issue, which was raised for the first time in a Petition to Reconsider filed in the Supreme Court of Tennessee.

In addition, Petitioner had ample opportunity to raise her alleged due process violation in her Petition for Certiorari to the Supreme Court of Tennessee and having failed to raise such issue, as a matter of Tennessee law, she was precluded in raising same in her Petition to rehear. *City of Nashville v. Wilson,* 88 Tenn 407, 12 S.W. 1082 (1890); *Lawler v. Mc-*

Canless, 220 Tenn. 342, 417 S.W.2d 548 (1967); *City of Morristown v. Sauls*, 61 Tenn App. 677, 457 S.W.2d 601 (1970).

II

Petitioner had adequate opportunity to present any alleged due process violation to the Supreme Court of Tennessee in her Petition for Writ of Certiorari to that Court. No such federal question was raised. It was not until her Petition for Reconsideration of the denial of Certiorari, that she raised her alleged federal question. Having failed to raise the federal issue at the first opportunity, Petitioner is precluded from seeking review in this Court. *Bailey v. Anderson*, 326 U.S. 203, 205-207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-244, 78 S.Ct. 1228, 1234, 2 L.Ed.2d 1283 (1958); Wright, Miller, Cooper and Grossman, Federal Practive and Procedure: Jurisdiction, Section 4022 (1977).

III

Even if there existed a federal issue involving the question of denial of procedural due process, the decision of the lower courts is based on independent and adequate State grounds. 16 Wright, Miller, Cooper and Grossman, Federal Practice and Procedure: Jurisdiction, Section 4019 (1977); 32 Am. Jur. 2d, Federal Practice and Procedure, Section 242 (1967). Since as a matter of Tennessee law Respondent has prevailed on the merits under Tennessee substantive law, Petitioner's alleged due process violation is moot.

IV

The Petition for Writ of Certiorari should be denied because there exists no federal question of substance nor any important or special reasons calling for the review of this case. Rule 19 United States Supreme Court Rules.

V

The so-called "federal issue" is so unsubstantial and frivolous, as to justify application by the Court of 28 U.S.C.S. Section 1912 and Rule 56, Subsection 4 of the United States Supreme Court Rules, regarding damages, including costs and attorney's fees.

CONCLUSION

All of Mrs. Rochelle's grounds for recovery were adequately considered and rejected by the Tennessee Courts; there exists an independent and adequate State ground for the State Court's decision; the Petition is totally devoid of any substantial federal question, and she failed to raise her federal issue at the first opportunity; therefore, the Petition for Writ of Certiorari should be denied and Respondent be awarded damages for the filing of a frivolous appeal.

Respectfully submitted,

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Certificate of Service

I do hereby certify that on this 25th day of August, 1978, I have served the foregoing Brief for Respondent in Opposition by mailing three copies of same, postage prepaid, to William H. Fisher, III, 2112 First Tennessee Bank Building, Memphis, Tennessee 38103, Attorney for Petitioner, and Marvin C. Goff, Jr., 2103 Clark Tower, Memphis, Tennessee 38137, Attorney for Respondent.

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